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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 932

NATIONAL ASSOCIATION OF THEATRE OWNERS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–30) is not yet reported. The Commission's *Fourth Report and Order* on subscription television is reported at 15 F.C.C. 2d 466.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to license subscription television.

2. Whether the Commission's licensing of subscription television under its prescribed rules constitutes an unconstitutional discrimination against the poor or impinges on First Amendment rights of free expression.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934 are set forth in Appendix B to the petition (pp. B–1 to B–4).

STATEMENT

On December 12, 1968, the Federal Communications Commission adopted its *Fourth Report and Order* on subscription television service (STV) (15 F.C.C. 2d 466), which established specific rules governing the operation of that service by broadcast stations.[1] Under these rules, one television station in any community with at least five commercial television stations may, upon application, be authorized by the Commission to provide subscription television service. The rules require the station, *inter alia,* to continue to provide free service for 28 hours a week conforming to the Commission's regular television rules,

[1] Subscription television is essentially the transmission in scrambled form of programs which can be received in intelligible form by the use of decoders, a charge is paid to the broadcast station involved.

and to carry certain types of programs now generally provided free to the public. They also prohibit commercial announcements (except relating to other STV programs) during STV operation.[2]

The Commission began its consideration of subscription television in February 1955 when it issued a *Notice of Proposed Rule Making,* 20 Fed. Reg. 935, soliciting the views of interested parties on the question whether the Commission is empowered to authorize subscription television and, if so, whether such authorization would be in the public interest. On October 17, 1957, the Commission issued a *First Report* on subscription television (23 F.C.C. 532), in which it concluded that it has the requisite authority to authorize subscription television service, but that an extensive trial operation governed by specified, detailed conditions and restrictions should first be initiated to determine whether permanent authorization on a general basis would serve the public interest and, if so, with what limitations.[3] The trial operation was ulti-

[2] These STV rules became effective June 12, 1969. They were followed by the adoption of certain technical rules (19 F.C.C. 2d 559) on September 4, 1969. The latter have not been challenged. Applications for STV authorization were accepted after the issuance of the technical rules with the understanding that no application would be granted until 60 days after the court of appeals issued its decision. To date, the Commission has received two applications for approval of technical systems, one of which was submitted by the Zenith Radio Corporation. No STV application has yet been granted.

[3] The *First Report* was followed by two further reports on the subject in 1958 and 1959. *Second Report*, 16 Pike & Fisher R.R. 1539; *Third Report*, 26 F.C.C. 265. The *Second Report* postponed the processing of applications for trial authorizations in light of

mately initiated in Hartford, Connecticut, in 1962. The Commission's authority to grantthis trial authorization was affirmed by the Court of Appeals for the District of Columbia Circuit in *Connecticut Committee Against Pay TV* v. *Federal Communications Commission,* 301 F. 2d 835, certiorari denied, 371 U.S. 816.

During their trial operation in Hartford, respondents Zenith and TECO jointly petitioned for a nationwide STV authorization. On March 24, 1966, the Commission issued a further *Notice of Proposed Rule Making and Notice of Inquiry,* 31 Fed. Reg. 5136, which sought comments on particular questions of authority and policy later considered and resolved in the *Fourth Report.* Based on this inquiry, which studied, *inter alia,* the Hartford experiment and another in Etobicoke, Canada, the Commission ultimately concluded (15 F.C.C. 2d at 483–488) that permanent authorization promised continuing and increased program material different from that available on free television, with a likely emphasis on films and sports. It also found a probability that STV would have its primary appeal among the approximately 54 percent of American families then earning between $4,000 and $9,999 rather than among the 18 percent in higher income levels. The Commission imposed certain pro-

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House and Senate Committee resolutions stating that STV should not be authorized without amendment of the Communications Act, and in light of the pendency of prohibitory legislation. Congress having failed to act, the *Third Report,* adopted a year later, announced the Commission's readiness to consider applications for trial authorizations under slightly revised conditions.

gram restrictions on STV which it concluded would prevent impairment of free television or significant audience, talent, or program siphoning (15 F.C.C. 2d at 504–509).[4]

In addition, the *Fourth Report* required that decoding devices essential for receipt of STV programs be rented rather than sold (15 F.C.C. 2d at 552–553), and prohibited licensees from entering into any agreement or understanding which interfered with or limited their responsibility for determining their rates or charges (15 F.C.C. 2d at 542–544). The Commission concluded that, on the basis of the information currently available to it, there was no reason to impose any other requirements on STV stations beyond the present rules and policies applicable to conventional television broadcasters (15 F.C.C. 2d at 545).

On appeal, petitioners challenged the Commission's statutory power to authorize nationwide over-the-air subscription television service and the Commission's authority to regulate the rates charged by STV operators. Additionally, they argued that subscription television is discriminatory against the poor, and that the program limitations imposed by the Commission con-

[4] These restrictions are: (1) no advertising may be broadcast during subscription operations, except for announcements promoting STV programs; (2) feature films may not be offered which have been generally released more than two years prior to the broadcast date, with several exceptions; (3) sports events which have been regularly broadcast live on free television in the two years preceding their subscription broadcast may not be shown on STV; (4) no series program with interconnected plots or substantially the same cast of characters may be offered on a subscription basis; (5) not more than ninety percent of the total STV broadcasting hours may consist of feature films and sports events combined (15 F.C.C. 2d at 597–598).

stitute an impermissible restraint on free speech violative of Section 326 of the Communications Act and the First Amendment.

A unanimous court of appeals, in a comprehensive opinion discussing all the points raised here by petitioners, concluded that the Commission has the statutory power to authorize subscription television service. Its holding was grounded upon the broad grant of general regulatory authority provided the Commission by the Communications Act in order to deal effectively with the rapidly-changing nature of radio broadcasting, a concept affirmed by this Court nearly thirty years ago in *National Broadcasting Company* v. *United States*, 319 U.S. 190, 219 (1943), and more recently in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167–178 (Pet. App. A–10 to A–11).

In regard to the matter of rate regulation, the court below approved the Commission's conclusion that it was not called upon at this time "to decide whether, or in what circumstances, its licensing regulatory functions might include surveillance or control over rates charged for services. The need for such control would presumably be rooted in developments in the market which demonstrated that STV had been granted a monopolistic or 'quasi-monopolistic' position, in which the competition of ordinary TV or other services was not effective to prevent abuse" (Pet. App. A–19 to A–20). On the basis of the rates charged in the Hartford experiment, the Commission had concluded that there was no likelihood of rate abuse. The lower court held that if and when the premises of its

regulatory approach change, the Commission could then reconsider the matter, but that the Commission's "predictions as to the probable course of rates and existence of meaningful competition [between STV and other forms of entertainment and enlightenment available in the community] are certainly not unreasonable" (Pet. App. A–20).

The court also found that the Commission had given full and fair consideration to the potential impact of STV on lower income groups and on free television and could reasonably find not only that there would be no adverse impact, but rather that there is a potential for substantial benefit to the public from the service (Pet. App. A–24 to A–27). Finally, the court concluded that the program limitations imposed by the Commission in order to insure that STV would operate as a supplemental program source, rather than siphoning off or merely duplicating the programming now available on free television, did not constitute an illegal restraint on free expression. It found that the purpose of the STV rules was to insure the economic vitality of free television rather than to suppress ideas and that the net effect would be to increase diversity of expression (Pet. App. A–27 to A–30).

ARGUMENT

While certain of the issues presented are not insignificant ones, the court below exhaustively discussed all relevant factors and properly sustained the Commission's *Fourth Report and Order* relating to subscription television. No arguments are raised here which were not carefully considered and correctly

resolved by the court of appeals. Accordingly, further review is not warranted.

1. The court below's holding that authorization of subscription television is consistent with the goal of the Communications Act of 1934 to foster diversity in broadcasting fully meets the test laid down by this Court in *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 278: "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." Title III of the Act, upon which the court relied, has repeatedly been interpreted as providing a broad grant of general regulatory authority over broadcasting subject only to specific exceptions and limitations.[5] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137–138; see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167–178.

While petitioners do not disagree with the "general validity" (Pet. 12) of the court's reasoning, they urge that STV is contrary to the traditional system of free television and should therefore not be authorized without a specific grant of authority by Congress

[5] See 47 U.S.C. 303, 307(a), 310, 312, 313(b). Moreover, as the lower court explained, both the legislative history of the Radio Act of 1927, 44 Stat. 1162, from which the Communications Act of 1934 is derived, and judicial precedent (see *Connecticut Committee Against Pay TV* v. *Federal Communications Commission*, 301 F. 2d 835, certiorari denied, 371 U.S. 816) support its holding (Pet. App. A–8 to A–17).

(Pet. 11–17). They argue that congressional intent can best be determined by the failure of the Communications Act to provide specifically for the rate regulation of broadcasting. However, as the lower court pointed out, "Direct charges for broadcasting services are not wholly unprecedented in this country * * *; testimony to this fact may be found in *Functional Music, Inc.* v. *FCC,* 107 U.S. App. D.C. 34, 274 F. 2d 543 (1958), cert. denied, 361 U.S. 813 (1959), and *Muzak Corp.,* 8 FCC. 581 (1941)" (Pet. App. A–12). And, although the court below, like the Commission, did not reach the question whether the Commission can regulate STV rates, it persuasively explained that whether or not the Commission has the power to establish rates is neither controlling nor necessarily relevant.

This is so, it explained, since "the principal method which Congress provided for combatting anticompetitive practices is regulation through the licensing process—a method which the Commission deemed sufficient to prevent any abuses of economic power by STV operators. See *Fourth Report,* 15 F.C.C. 2d at 548, 596–97" (Pet. App. A–19).

In this regard, the court below approved the Commission's conclusion that the experience provided by the Hartford experiment indicated no likelihood of rate abuse, and found that its "predictions as to the probable course of rates and existence of meaningful competition are certainly not unreasonable" (Pet. App. A–20). Of course, the Commission is free to reconsider the matter should experience with STV in

general operation demonstrate the necessity for more stringent regulation. As the court properly noted: "The need for such control would presumably be rooted in developments in the market" (Pet. App. A-19).[6]

2. In assessing petitioners' suggestion that the program restrictions placed on subscription television may amount to a restraint on free expression, the starting point for analysis must be the special application of First Amendment standards to broadcasting. As this Court stated last term in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 390:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

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[6] Petitioners' contention (Pet. 16) that an STV licensee will be a "natural monopol[ist]," because only one can be licensed in any community, is fallacious. Under the Commission's rules, an STV licensee will necessarily face competition from at least five established conventional licensees, transmitting free programs, as well as from other forms of sports and entertainment offered "live" in the community. Both the Commission (15 F.C.C. 2d at 474–488, 497, 508–509) and the court below (Pet. App. A-21 to A-22) gave thoughtful consideration to this issue and found petitioners' argument unpersuasive.

Suppression of ideas is clearly not the purpose, nor will it be the effect, of the program restrictions placed by the Commission on STV. On the contrary, the restrictions are intended to insure that subscription television will develop as a viable supplement to free television, but not be destructive of the service that viewers are currently receiving. Thus, on the one hand, the restrictions are designed to insure that types of programs presently available to viewers of free television will not become the province of STV. On the other, the aim is to require subscription television licensees to develop new types of programming in order to compete successfully with existing service. The likely result will thus be greater, not lesser, diversity in programming, and a wider range of choice for viewers who choose to avail themselves of the new service. The court below aptly observed that "it can be said here, as in *Banzhaf,* that '[e]ven if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss.' 405 F. 2d at 1102." (Pet. App. A–30; see *Banzhaf* v. *Federal Communications Commission,* 405 F. 2d 1082, certiorari denied *sub nom. Tobacco Institute* v. *Federal Communications Commission,* No. 47, this Term (October 13, 1969)).

3. Finally, petitioners contend that authorization of subscription television is an unconstitutional discrimination against low income groups, and ask this Court to "declare that access to free television is a constitutionally protected right" (Pet. 24). While we

share with the court below (Pet. App. A–25 to A–26) considerable skepticism as to the validity of such a far-reaching constitutional principle, the sufficient answer for present purposes is that the issue is simply not presented in this case.

The court of appeals found that the Commission's rules designed to protect free television from the siphoning of programming by STV were reasonable and amply supported by the record (Pet. App. A–25). These rules afford substantial assurance that viewers relying upon free television will suffer no diminution of the information and entertainment presently afforded to them. Moreover, the court below identified several ways in which the viewing public may be benefited by development of subscription television service. It noted, *inter alia*, that a new STV licensee will be required by the Commission to carry a minimum of 28 hours of free programming in addition to that presently available; that subscription television will provide entertainment unavailable to most of the viewing public by reason of distance, lack of seating space, or the cost of attendance at live performances; and that competition from STV may well compel conventional licensees to upgrade the quality of programming and services they presently offer (Pet. App. A–26 to A–27). In view of these considerations, the court of appeals was surely correct in characterizing petitioners' discrimination claim on behalf of the poor as "insubstantial" (Pet. App. A–25).

CONCLUSION

For the foregoing reasons, and the reasons developed at greater length in the opinion below, on which we here rely, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970